

U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 28 June 2005

CASE NO.: 2003-LHC-02881

OWCP NO.: 08-120387

In the Matter of

WILLIE EAGLIN
Claimant

v.

BOLLINGER SHIPYARDS, INC.
Employer

and

AMERICAN LONGSHORE MUTUAL
ASSOCIATION, LIMITED
Carrier

Appearances: Reginald E. McKamie, Esquire
For Claimant

Alan G. Brackett, Esquire
For Employer

Before: JANICE K. BULLARD
Administrative Law Judge

DECISION AND ORDER

This is a claim for benefits under the Longshore and Harbor Worker' Compensation Act ("LHWCA" or "the Act"), 33 U.S.C. § 901 *et seq.* This matter was referred to the Office of Administrative Law Judges ("OALJ") on September 23, 2003 for a formal hearing. The matter was referred to me on June 1, 2004 and a Notice of Hearing was issued on June 9, 2004, setting the hearing for October 27, 2004. On October 19, 2004, an Order Rescheduling Hearing was issued, which set the hearing on October 28, 2004.

The hearing was held before me on October 28, 2004 in Houston, Texas. At that time, the parties were given the opportunity to present evidence and make oral argument.¹ The parties

¹ In this decision, "TR" refers to the transcript of the October 28, 2004 hearing. "CX" refers to Claimant's exhibits and "EX" refers to Employer's exhibits.

submitted written closing argument. The decision that follows is based upon an analysis of the record, the arguments of the parties and the applicable law.

I. CONTENTIONS OF THE PARTIES

Claimant contends that as the result of a work related accident on July 23, 2001, he injured his shoulder and requires surgery, which he contends should be paid for by Employer. Additionally, Claimant contends that he is entitled to receive therapy to help him recover from his shoulder injury. Claimant further contends he is entitled to sixty-six and two thirds percent of his average weekly wage during his recovery period.

Employer contends that the medical evidence does not support Claimant's contention that he requires surgery.

II. ISSUES FOR ADJUDICATION

1. Nature and extent of injury
2. Claimant's entitlement to future medical benefits

III. STIPULATIONS

The parties entered the following stipulations:

1. Jurisdiction
2. Date of injury: July 23, 2001
3. The injury to Claimant's right arm occurred in the course and scope of Claimant's employment; however, the injury to Claimant's shoulder is disputed
4. An employer-employee relationship existed at the time of Claimant's injury
5. Employer received timely notification of the injury
6. Notices of Controversion filed on March 12, 2003, July 2, 2003 and September 12, 2003
7. Informal Conference held on July 16, 2003
8. Claimant's average weekly wage at the time of the injury was \$517.05
9. Employer and Carrier have paid Claimant weekly benefits in the total amount of \$18,197.42, which includes benefits through July 17, 2002, plus the 3% permanent partial disability rating assigned by Dr. Gabel, which equals 9.36 weeks of benefits.

10. Claimant does not make any claim for wage benefits during the time period above.

IV. FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Summary of the Evidence

Testimony

Testimony of Claimant Willie Eaglin

Claimant works on the docks doing mechanic work, welding and shipfitting. TR at 36. As part of his employment, Claimant sometimes lifts loads weighing seventy five or one hundred pounds. TR at 67. Also, Claimant testified that he has to swing a fifteen or twenty pound maul, lift chain hoists, turn buckles and operate fifty ton jacks. TR at 67-68. While working, Claimant carries welding rods in a work bucket, which he must pull to his work location. TR at 68.

On July 23, 2001, Claimant was working for Bollinger Shipyard (hereinafter referred to as "Employer") and was injured when a jack he was operating slipped and caught his arm. TR at 34. Claimant testified that he immediately reported the injury to his supervisor, James Abrams. TR at 34. After the incident, Claimant continued to work and completed his shift. TR at 40. Claimant also worked on July 24, 2001. TR at 40. On July 25, 2001, Claimant began work but was unable to complete his shift due to the condition of his arm. TR at 40. Claimant began working on a bubble pad, which required him to climb a ladder approximately 12 or 14 feet high. TR at 37, 39. Claimant experienced weakness in his arm and was unable to lift it. He advised his supervisor that he could not continue working. TR at 38-39.

Claimant was seen by Dr. Abiel Garcia, who told Claimant he had a strained shoulder. TR at 40. Dr. Garcia sent Claimant back to work in a light duty capacity. TR at 41. After the pain in Claimant's shoulder continued, Dr. Garcia referred him to Dr. Bruce Weiner, who sent Claimant for physical therapy. TR at 41. Claimant subsequently consulted Dr. Gerard Gabel, who performed surgery on his bicep. TR at 42. Claimant testified that at the time of his bicep surgery, he was still having pain in his shoulder that prevented him from working. TR at 42. During the course of his treatment with Dr. Gable, Claimant received cortisone injections in his shoulder, which alleviated his discomfort, and allowed him to complete basic work around his house, such as mowing the lawn and washing his car. TR at 42-44. Claimant testified that the shots helped for a while, but said that the pain was worse when it returned. TR at 45.

Dr. Gabel sent Claimant for an MRI, which showed a small tear in Claimant's shoulder tendon. TR at 42-43. Dr. Gabel recommended surgery, that Claimant did not undergo because Employer had terminated his workers' compensation benefits. Claimant testified that he continued to experience pain in his shoulder that prevented him from working. TR at 45.

Following his injury, Claimant returned to work in a light duty capacity for several months, working in the tool room. TR at 57. Claimant was responsible for taking orders and assigning tools in the tool room. TR at 70. He would write down orders and other workers

would pick up the tools. TR at 71. Claimant testified that his arm was in a sling when he worked in the tool room. TR at 71. Injured workers are assigned to the tool room until they are capable of returning to full duty. Id. Claimant stated that permanent tool room positions exist and he would be willing to take that job if he could get it. TR at 71-72.

Claimant testified he hasn't worked for anyone since his injury but admitted that he has done painting, mechanic work and mowed lawns for other people. TR at 37; 58-59. Claimant testified that during the painting jobs, he would use a roller in a down motion, but would have someone assist him roll in an upward direction. TR at 63. Claimant testified he is capable of both pushing and pulling a lawnmower. Id. Claimant addressed a surveillance video that showed him mowing his lawn. EX 13. Claimant testified that after he mowed the lawn, his arm throbbed and he needed to take pain medication. TR at 47. He said that he had only mowed a small portion of his lawn and he had the lawn mower wheels set high, so it could roll easily. TR at 70. Claimant does not use a self-propelled lawn mower and testified that pulling the mower is easier than pushing it. Id. Claimant testified that the activities portrayed in the surveillance video are minimal compared to his work requirements. TR 68.

In addition to using a lawnmower, Claimant testified that he occasionally uses a weed eater and can use a machete for about "three or four licks." Id. Claimant testified he also operated a small pressure washer after his injury. TR at 60. He is able to drive his car and performs his own automobile repairs and is able to take out his trash. TR at 62-63. When grocery shopping, Claimant carries the heavy groceries with his left hand. Id. Claimant testified that playing pool is his hobby but said that when he strikes the ball it "shocks" him. TR at 63. Claimant testified that he could not wash his back and said that when he brushes his teeth, the motion feels like his arm is "coming loose." Id.

Claimant does not take any pain medication. TR at 61. Other than the examination conducted by Dr. Fulford, Claimant did not receive treatment from any other doctors after he began treatment with Dr. Gabel. TR at 61.

Before the injury involved in this action, Claimant injured his shoulder when he fell through a manhole while working for Halter Marine in 2000. TR at 34-35. As a result of that injury, Claimant was out of work for approximately six months. TR at 52. Claimant testified that the residual problems with his shoulder upon his return to work did not prevent him from doing his job. TR at 54. Further, Claimant testified that he was not injured as badly in the incident in 2000 as he was in the incident while working for Employer. Id. As a result, the pain in Claimant's shoulder when he went back to work after the Halter Marine incident was not as great as the pain when he was injured working for Employer. Id. at 55. Upon his return to work following the injury at Halter Marine, Claimant worked regular duty. TR at 56.

Testimony of Stephen Vandeweghe

Mr. Vandeweghe is an employee of David Brogue Investigations. TR at 73. Mr. Vandeweghe wrote the surveillance report submitted as EX 12. Id. Additionally, he was the person who filmed the surveillance video submitted as EX 13. Id. Mr. Vandeweghe testified that he recognized Claimant as the person on whom he conducted surveillance. Id.

Testimony of Carla Seyler

Ms. Seyler testified as an expert in the field of vocational rehabilitation. TR 78. She holds a B.A. in Psychology from the University of New Orleans and an M.S. in Counseling from Loyola University. EX 17. Ms. Seyler met with Claimant and obtained information about his education, work history and his medical condition in order to assess his vocational capacity. TR at 78. Additionally, she conducted vocational testing and conducted a transferable skills analysis to identify any skills that would transfer to another occupation. TR at 79. Ms. Seyler reviewed the medical records of several doctors and health care facilities along with the deposition of Dr. Fulford.

Ms. Seyler testified that Claimant possesses skills that could be transferred to another profession. TR at 80. Specifically, Ms. Seyler noted that Claimant worked in the ship construction and repair industry and has worked as a welder and a mechanic. Id. Additionally, Claimant has done construction and home repair work. Id. Ms. Seyler further testified that Claimant has a “working knowledge” of plumbing, construction and electrical wiring. TR at 81.

Ms. Seyler testified that Claimant would be able to return to employment at the shipyard since he was given a full release by Dr. Gabel, his treating physician. Id. Further, she testified that it was unlikely that Claimant would experience any wage loss if he went back to his regular employment. Id.

Ms. Seyler performed a labor market survey to determine if alternate employment was available for Claimant. TR at 82. Ms. Seyler provided available positions in a report dated October 6, 2004. EX 11 at 10. She submitted the positions to Dr. Gabel, Dr. Fulford and Dr. Elkousy for approval and received approval from Dr. Fulford. TR at 83, EX 11 at 1. Ms. Seyler based the labor market survey on the restrictions that were imposed on Claimant by Dr. Fulford and Dr. Elkousy. TR at 89. The restrictions given by the doctors were based on their examinations of Claimant and not based on whether he underwent surgery. Id.

Ms. Seyler testified that Claimant is employable and that the range of his wage earning capacity would be from an entry level wage of \$7.00 an hour to \$10.00 an hour and as high as \$12.23 per hour. TR 84. Based on Claimant’s work history in the mechanic area, Ms. Seyler testified that Claimant would be able to obtain employment at a wage higher than the lowest wage in the range she identified. TR at 84.

Ms. Seyler testified that based on a form completed by Dr. Fulford, Claimant had not reached maximum medical improvement at the time of Dr. Fulford’s examination. TR at 85. Ms. Seyler stated that it is her understanding that Claimant would be capable of performing any of the positions in her report without undergoing surgery. TR at 86.

Testimony of Dr. Robert Fulford M.D.

Dr. Fulford testified at a videotaped deposition on September 29, 2004. CX. 21. Dr. Fulford is Board certified in orthopedic surgery and is a member of the American Board of Orthopedic Surgery. CX 21 at 5-6. He attended undergraduate training and medical school at

Queen's University in Kingston, Ontario. CX. 21 at 5. Dr. Fulford is licensed in Harris County, Texas and is a member of the Harris County Medical Society, the Harris County Orthopedic Society and the Clinical Orthopedics Society of America. Id.

Dr. Fulford was appointed by the Department of Labor to conduct an independent medical examination of Claimant, which the doctor performed on August 20, 2003. CX. 21 at 6. During the examination, Claimant's major complaint was pain in his right arm. CX. 21 at 10. Claimant told him he was working with a jack and as the jack fell, "he heard a pop and felt a lump in his right arm at the elbow." Id. Dr. Fulford testified that Claimant complained of pain in his upper arm and lower arm. Id. Initially, he had more pain in his shoulder, which was helped with cortisone shots. Id. In January 2002, Claimant had surgery on his right elbow, which helped the pain in his lower arm but he continued to have pain in his shoulder. Id.

An MRI of Claimant's shoulder revealed he had a partial tear of a tendon. CX. 21 at 11. Claimant told Dr. Fulford that he could not lift anything with his right arm unless he kept his right arm tucked into his side. Id. Claimant also complained of numbness and "funny feeling" in his middle two fingers and stated that he attempted to work but could not lift anything heavy because of the pain and he had to keep his right arm tucked into his side and he had no strength. Id. When Claimant attempted to move his arm away from his body he had pain. Id. Claimant also reported to Dr. Fulford that he had to keep his arm tucked into his side when he brushed his teeth. CX. 21 at 25.

An MRI report from April 28, 2003 revealed that Claimant had degenerative changes in the area of the socket where the ball of the arm bone fits into the scapula. CX 21 at 12. Also, Claimant had a partial thickness tear of his rotator cuff. Id. Dr. Fulford testified that the MRI findings are consistent for a person of Claimant's age who has performed manual labor most of his adult life. CX 21 at 23.

During his examination, Claimant experienced pain when he attempted to flex against resistance. CX 21 at 15. Also, Claimant described feeling pain when Dr. Fulford conducted the Neer and Hawkins maneuvers, which involves rotating a patient's arm to test shoulder stability. Id. After his examination, Dr. Fulford's impression was that Claimant had a torn bicep tendon and a rotator cuff tear of the supraspinatus tendon. Id.

Dr. Fulford testified that as of August 20, 2003, Claimant had not yet reached maximum medical improvement. CX 21 at 17. Dr. Fulford stated that he believed Claimant should have surgical arthroscopy to help repair the partial tear of the supraspinatus tendon. CX 21 at 17. Dr. Fulford stated that he anticipated a post-operative period of three months until Claimant could resume normal activities. CX 21 at 18. Dr. Fulford also testified that he believed Claimant's shoulder complaints were related to his July 23, 2001 injury. Id. Dr. Fulford's opinion that Claimant should undergo surgery was based largely on Claimant's complaints of severe pain. CX 21 at 25.

Dr. Fulford testified that he viewed the surveillance video that was taken of Claimant. CX 21 at 18. Dr. Fulford testified that the video did not show Claimant engaged in any of the activities he would normally engage in while working and that the video was not descriptive of

Claimant's work environment. CX 21 at 19-20. He also testified that Claimant's actions in the videotape are inconsistent with the complaints Claimant made to him. CX 21 at 24. Dr. Fulford testified that viewing Claimant's action on the videotape "brings into doubt the reactions I observed in August, compared with the ones that were demonstrated on the video in March of 2003, some five months before I saw him." CX 21 at 26. Dr. Fulford stated that the videotape seriously calls into question the complaints Claimant made to him. CX 21 at 27.

Dr. Fulford testified that if Claimant was taking medication to dull his pain, the medication could impact the type of activities he could perform. CX 21 at 28. He noted that the videotape surveillance was made at a time when Claimant was between cortisone injections, and that cortisone injections could ease the pain to allow a person to perform certain functions. Id. Dr. Fulford stated that Claimant's ability to push and pull a lawn mower indicated he has a better range of motion in his shoulder than Claimant demonstrated during his examination. CX 21 at 29.

Documentary Medical Evidence

Medical Records of Dr. Abiel Garcia (CX 16)

Claimant was initially examined by Dr. Garcia on July 26, 2001. CX 16 at 3. At that time, Claimant reported intense pain from his right shoulder into his hand, which occurred after Claimant felt a "pop" when he attempted to handle a jack. Id. Dr. Garcia diagnosed Claimant as having right arm and right shoulder pain and released him to return to work with no restrictions. CX 16 at 4. At a July 31, 2003 follow-up visit, Dr. Garcia noted that Claimant did not show any improvement and was still experiencing intense pain. CX 16 at 5.

Progress notes in Dr. Garcia's records indicate that Claimant began physical therapy on August 1, 2001. CX 16 at 7. Claimant tolerated therapy well and he was scheduled for therapy once a day for a week. Id. On August 3, 2001, Claimant indicated the pain in his right arm was the same and the notes state Claimant's arm was very stiff. Id. On August 7, 2001, Claimant reported that his arm hurt when he carried work items. Id. There was minimal improvement seen in Claimant's right elbow region. Id.

On August 7, 2001, Claimant reported to Dr. Garcia that he was receiving physical therapy, but stated it was not helping him. CX 16 at 9. The notes of his physical exam indicate that Claimant had tender biceps and painful and limited extension in his right arm. Id. Also, during the examination of his right shoulder, Claimant raised his arm "very painfully." Id. Dr. Garcia referred Claimant for an MRI of his right arm.

On September 4, 2001, Claimant underwent an MRI on his right elbow and distal right biceps region, which revealed mild thinning and increased signal within and about the distal biceps brachii and brachialis tendon. CX 16 at 11. The MRI report noted that these findings are consistent with mild strains and/or partial tears. Id. On September 11, 2001, Claimant was seen again by Dr. Garcia who diagnosed Claimant with a right arm and shoulder sprain and released Claimant to work with several restrictions. CX 16 at 12-13.

Dr. Garcia also treated Claimant after his April 2000 injury when he injured his right arm and shoulder. Dr. Garcia referred Claimant for an MRI of his right shoulder, which was performed on April 28, 2000. EX 16 at 25. The MRI revealed that in Claimant's rotator cuff, a moderate thickening and increased signal was seen involving the subscapularis tendon. Id.

Medical Records of Dr. Gerard T. Gabel (EX 9; CX 13)

Claimant was first examined by Dr. Gabel on October 2, 2001. EX 9 at 1; CX 13 at 3. Dr. Gabel reported that Claimant was using a jack at work and "felt a pop in his right arm," which resulted in shoulder and elbow discomfort. Id. Claimant complained of "persistent anterior elbow discomfort" and difficulty extending his elbow as well as persistent shoulder discomfort." Id. During his physical examination, Claimant exhibited pain during range of motion testing. Id. Additionally, he exhibited pain when extending his elbow. Id. Claimant was diagnosed with a "shoulder, elbow sprain" and released to return to work with a restriction on the amount of weight he could lift. EX 9 at 2; CX 13 at 3.

On November 27, 2001 Dr. Gabel reported that Claimant's shoulder was doing better, but the condition of his elbow was the same as it was at his last visit. EX 9 at 3; CX 13 at 5. Dr. Gabel reported his opinion that Claimant's shoulder would be "fine." Id. He reported that he wanted another MRI conducted on Claimant's elbow. Id. Claimant was released to return to work with a restriction on the amount of weight he could lift. EX 9 at 3-4; CX 13 at 5-6.

Claimant underwent an MRI on his elbow on December 10, 2001, which revealed a mild partial tear of his biceps tendon. EX 9 at 5; CX 13 at 7. Dr. Gabel reported that repair of the tear would be reasonable based on Claimant's complaints. EX 9 at 7; CX 13 at 9. Claimant was diagnosed with a biceps tear and released to work with a lifting restriction. EX 9 at 8; CX 13 at 10. Dr. Gabel performed surgery on Claimant on January 9, 2002 to repair his biceps tear. EX 9 at 10; CX 13 at 12.

On January 29, 2002, Claimant was seen by Dr. Gabel for his first follow-up after surgery. Dr. Gabel reported that Claimant's wound "looked quite good." Claimant was released to work with the restriction that he not use his right arm. EX 9 at 12-13; CX 13 at 14-15. On April 2, 2002, Dr. Gabel reported that he was going to start Claimant on a light strengthening program. EX 9 at 16; CX 13 at 18. Dr. Gabel reported that Claimant displayed good range of motion and placed a five pound weight limit on his arm. Id. On June 3, 2002, Dr. Gabel reported Claimant was approaching full range of motion. EX 9 at 18; CX 13 at 20. The weight limit on Claimant's arm was increased to twenty five pounds. Id. Dr. Gabel indicated he would follow up in a month, which would probably lead to a full release and maximum medical improvement. Id. On August 26, 2002, Dr. Gable reported that Claimant reached maximum medical improvement and released him to return to work at full duty. EX 9 at 22; CX 13 at 24. Dr. Gabel reported Claimant had a 3% upper extremity and 2% total body impairment. EX 9 at 22, 24; CX. 13 at 24, 26, CX 20 at 4.

On October 8, 2002, Claimant reported some discomfort in his biceps region, which Dr. Gabel advised him would "simply have to burn out." EX 9 at 25; CX 13 at 27. On November 12, 2002, Claimant did not have any discomfort at the biceps insertion level, but was tender in

the lateral musculotendinous junction of the biceps. EX 9 at 27; CX 13 at 29. On January 2, 2003, Dr. Gabel reported that Claimant's tenderness at his distal biceps musculotendinous junction had reoccurred along the radial nerve and he administered an injection along Claimant's radial nerve. EX 9 at 29; CX 13 at 31.

Dr. Gabel reported on February 17, 2003 that Claimant did not experience any relief from the injection he received along his radial nerve. EX 9 at 31; CX 13 at 33; CX 20 at 3. Dr. Gabel stated the pain could be referred pain from his shoulder, as Claimant experienced pain at his shoulder level during elevation and rotation. Id. Dr. Gabel administered a subacromial injection. Id. Dr. Gabel reported that the injection completely alleviated the discomfort Claimant was experiencing in his upper arm. EX 9 at 34; CX 13 at 36; CX 20 at 2. Dr. Gabel wanted to obtain an MRI of Claimant's shoulder and instituted a twenty pound weight limit on Claimant's right arm. Id.

On April 28, 2003, an MRI of Claimant's right shoulder was taken, which revealed a small partial thickness intrasubstance tear of the supraspinatus tendon in Claimant's rotator cuff. EX 9 at 36; CX 13 at 38. After reviewing Claimant's MRI results, Dr. Gabel performed a subacromial injection of Xylocaine and Marcaine. EX 9 at 38; CX 13 at 40; CX 20. Dr. Gabel noted that Claimant received three cortisone injections and underwent therapy with no sustained response. Id. As a result, Dr. Gabel noted that surgery would be an appropriate consideration and recommended a subacromial decompression. Id.

On June 30, 2003, Dr. Gabel reported that Claimant was examined by Dr. Elkousy, who did not agree with Dr. Gabel's recommendation for surgery. EX 9 at 40; CX 13 at 42, CX 19. Dr. Gabel stated that the corticosteroid injections relieved the discomfort in Claimant's arm and shoulder area. Id. Dr. Gabel stated he would refer Claimant to Dr. Collins for a second opinion and noted that Dr. Elkousy did not provide any details regarding how he would proceed. Id.

On October 8, 2003, Dr. Gabel reported that he viewed a video of Claimant taken in March, 2003, which shows Claimant using a lawnmower. EX9 at 42. Dr. Gabel stated that Claimant's actions in the video "would not be consistent with a significant subacromial impingement process" Id. Additionally, he stated that the video indicates that Claimant functions "reasonably well despite the discomfort." Id. Dr. Gabel also stated "I do not think surgery would be indicated and in essence a full duty release would be fine." Id. Dr. Gabel concluded "the surveillance is not perfectly consistent with his history and physical and therefore I would recommend deferring on any surgical issue and giving him a full release." Id.

Medical Records of Dr. Hussein Elkousy (EX 10)

Dr. Elkousy examined Claimant on June 10, 2003 and Claimant reported to him that he could not move his arm away from his body. EX 10 at 1. Claimant indicated that he had pain in his entire shoulder and upper arm region. Id. Dr. Elkousy reported that Claimant "was rather dramatic" with his right shoulder. EX 10 at 2. Dr. Elkousy reported that he could passively elevate Claimant's arm and leave it at 170 degrees. Id. Additionally, Dr. Elkousy was able to abduct Claimant to 100 degrees and rotate Claimant's arm during his examination. Id. Dr. Elkousy stated that it is not clear to him that Claimant's MRI results, which show a small partial

thickness rotator cuff tear would result in the amount of symptoms displayed by Claimant. Id. Dr. Elkousy reported that he did not recommend surgical intervention because, although he found Claimant to have pathology in his shoulder, he did not believe Claimant would improve significantly after surgery. EX 10 at 3.

Medical Records of Doctor Robert A. Fulford (CX. 2)

Dr. Fulford conducted an independent medical examination of Claimant on August 20, 2003. CX 2 at 1. Claimant related to Dr. Fulford that when the jack he was working with fell, “he heard a pop and felt a lump in his right arm at the elbow.” Id. Dr. Fulford reported that Claimant had pain in his upper arm and in his lower arm at the elbow, which was relieved after he had surgery on his elbow. Id. Claimant reported to Dr. Fulford that he was experiencing sharp and severe pain in his shoulder area. CX 2 at 1-2. Claimant told Dr. Fulford that he has pain whenever he attempts to lift something with his right upper extremity unless his arm is kept tucked into his side. CX 2 at 2. Dr. Fulford reported that Claimant could flex and extend his elbow, but he experienced pain if he attempted to move it away from his body. Id. Dr. Fulford reported that Claimant was able to maintain his shoulder abducted at 90 degrees, however any movement beyond that position caused him severe pain. Id.

Dr. Fulford’s opinion was that Claimant had “a form of rotator cuff and impingement type syndrome that . . . start[s] from the injury of July 23, 2001.” CX 2 at 3. Dr. Fulford also opined that Claimant required a subacromial decompression, which would allow Claimant to return to full duties. Id. Dr. Fulford opined that Claimant’s shoulder complaints were causally connected to the injury he sustained on July 23, 2001. Id.

Medical Records of Dr. Bruce Weiner (EX 16)

Claimant was treated by Dr. Weiner at East Houston Orthopedics and Sports Medicine after he injured his shoulder in April 2000. Claimant was first examined by Dr. Weiner on May 3, 2000. EX 16 at 4. Claimant reported that he fell while working and injured his right arm and right shoulder. EX 16 at 8, 20. Dr. Weiner’s impression was that Claimant had a severe right shoulder strain. EX 16 at 20.

In a report dated August 1, 2000, Dr. Weiner stated Claimant complained of pains that were very disproportionate to the objective findings. EX 16 at 19. Claimant had full range of motion during his examination but stated “it killed him in the front of the shoulder, the back of the shoulder and the upper thoracic spine.” Id. On August 21, 2000, Claimant reported to Dr. Weiner that his “arm still hurts a lot.” EX 16 at 11.

Claimant received an MRI, which was reviewed by Dr. Weiner on October 4, 2000. EX 16 at 12. The MRI did not show any significant abnormality. Id. Dr. Weiner reported that he did not believe Claimant required surgery and stated that Claimant had been relatively noncompliant by missing appointments. EX 16 at 18.

On February 6, 2001, Dr. Weiner reported that Claimant reached maximum medical improvement. EX 16 at 16. Dr. Weiner stated Claimant had a 2% impairment in his shoulder due to the persistent weakness, aches and tendonitis in his arm. Id.

Medical Records from Concentra Medical Centers (CX 11 & CX 12)

Claimant was seen at Concentra Medical Centers on February 27, 2002. CX 11. Claimant reported that he injured his shoulder while working for Employer. Id. At that time, he reported that his injury status had not changed. Id. Claimant was treated with massage therapy and therapeutic exercises and it was reported that Claimant was increasing the extension in his right elbow. Id.

Claimant was seen again at Concentra Medical Centers on March 13, 2002. CX 12 at 1. On that date, Claimant had full range of motion. Id. At his appointment on March 28, 2002, Claimant reported that the bulge in his deltoid tuberosity region had gotten bigger and more bothersome. CX 12 at 2. On May 15, 2002, Claimant reported that he felt strong and was ready to be discharged. CX 12 at 3. On June 3, 2002, Claimant reported that he was better. CX 12 at 4. The report from Concentra states that Claimant had received maximum benefit from therapy and that all his goals were met. Id.

Other Evidence

Reports of Carla Seyler (EX 11)

Ms. Seyler prepared a Vocational Rehabilitation Evaluation report dated September 27, 2004. Claimant advised Ms. Seyler that he injured his right shoulder in October 2000 when he fell through a manhole while working. EX 11 at 6. Claimant stated he injured his right arm and shoulder again on July 23, 2001. Id. Claimant stated that he wanted to have shoulder surgery so that he could return to his regular work. EX 11 at 8. If he could not return to his normal work, Claimant expressed an interest in opening a mechanic shop to perform automotive repairs. Id.

Ms. Seyler noted that in an October 2003 report, Dr. Gabel indicated Claimant could be released to full duty. EX 11 at 9. As a result, Ms. Seyler concluded that he “could perform his regular occupation as a shipfitter or mechanic.” Id.

Report of Viola Lopez (CX 4)

Ms. Lopez performed a vocational assessment of Claimant on behalf of Claimant’s counsel. CX 4 at 1. Ms. Lopez administered vocational testing on August 18, 2004 and interviewed Claimant on August 25, 2004. Id. Claimant reported he would experience pain in his shoulder with activity and that he experienced muscle spasms, aching and lack of strength in his shoulder. CX 4 at 3. Claimant stated that he could not reach with his right upper extremity due to the pain and that he must reach and drive with his left upper extremity. Id. Claimant stated that he is limited in performing household chores including yard work. Id. Also, Claimant reported he was not able to shoot pool, which was a hobby prior to his injury. Id.

Ms. Lopez reported that Claimant did not possess skills, which would transfer from “his work history into lighter more physically appropriate work once he is released to return to gainful activity.” CX 4 at 4. Ms. Lopez stated it was her opinion that Claimant was disabled from a return to competitive employment. CX 4 at 5. Dr. Fulford restricted Claimant to lifting 0 to 10 pounds and walking one hour a day intermittently, which would preclude Claimant from working as a shipfitter or mechanic. Id. As a result, Claimant would not be able to return to his job and would experience a loss in wage earning capacity. Id.

Reports of Data Probe Investigations (EX 12)

In a report dated March 19, 2003, the investigator stated that Claimant was not found to be gainfully employed. EX 12 at 1. During the course of surveillance, Claimant was observed operating a lawn mower, using a machete with his right arm to cut weeds, using a high pressure water wand with his right arm to wash his vehicle, using both arms to open and close the hood and trunk of his vehicle and carrying groceries. Id.

Other Evidence

Employer’s First Report of Injury, Form LS-202 (EX 1; CX 14)

Payment of Compensation Without Award, Form LS-206 (EX 2)

Notice of Controversion, Form LS-207, dated March 12, 2003 (EX 3)

Notice of Final Payment, Form LS-208, dated May 19, 2003 (EX 4; CX 10)

Notice of Controversion, Form LS-207, dated July 2, 2003 (EX 5)

Notice of Final Payment, Form LS-208, dated August 14, 2003 (EX 6)

Memorandum of Informal Conference, Form LS-280 (EX 7; CX 7)

Notice of Controversion, Form LS-207, dated September 12, 2003 (EX 8)

Surveillance Videotape (EX 13)

Correspondence of Tonya Whittington dated March 12, 2003 & Report of Earnings, Form LS-200 (EX 14)

Wage records of Claimant (EX 15; CX 6)

Pay statements for the periods of 9/30/2000 to 10/6/2000; 11/4/00 to 11/17/00; 11/18/00 to 12/1/00 (CX 5)

Letter dated September 5, 2003 from Carolyn Salyer, Claims Examiner, U.S. Department of Labor, Employment Standards Administration to Claimant and Carrier (CX 8)

Letter dated March 18, 2003 from Carolyn Pharr, Claims Examiner, U.S. Department of Labor, Employment Standards Administration to Claimant (CX 9)

Employee's Claim for Compensation, Form LS-203, dated 6/10/03 (CX 15)

Texas Workers' Compensation Work Status Report, dated 2/17/03 (CX 17)

Corticosteroid Injection information sheet from Dr. Gabel, along with Texas Workers' Compensation Work Status Reports dated 6/30/03 and 4/1/03. (CX 18)

Letter dated March 15, 2002 from Employer to Claimant (CX 23)

B. ANALYSIS

1. Claimant has established a prima facie case under the Act, and is entitled to the §20(a) presumption.

An injury is defined in part by section 2(2) of the LHWCA as "accidental injury or death arising out of and in the course of employment." 33 U.S.C. § 902 (2). The Claimant in an action for LHWCA benefits must present a prima facie case for compensation by establishing that 1) he suffered a harm and 2) conditions existed at work, or an accident occurred at work, which could have caused, aggravated or accelerated the condition. Conoco, Inc. v. Director, OWCP, 194 F.3d 684, 687 (5th Cir. 1999). Once the Claimant presents a prima facie case, the § 20(a) presumption of the LHWCA is triggered. Ortco Contractors v. Charpentier, 332 F.3d 283, 287 (5th Cir. 2003). The § 20(a) presumption provides:

In any proceeding for the enforcement of a claim for compensation under this Act, it shall be presumed, in the absence of substantial evidence to the contrary that the claim comes within the provisions of this Act.

33 U.S.C. § 920(a).

Claimant asserts he injured his right arm and shoulder on July 23, 2001 as he operated a jack while working for Employer. Employer has stipulated that the injury to Claimant's right arm occurred during the course and scope of his employment. However, Employer is disputing the assertion that Claimant's right shoulder was injured during the course and scope of his employment. Further, Employer has argued that there is no medical evidence to support Claimant's contention that he requires surgery on his right shoulder.²

During his initial examination by Dr. Garcia, Claimant reported hearing a "pop" and felt intense pain in his shoulder and arm while using the jack at work. Throughout the course of his treatment with Dr. Garcia, Claimant complained of the pain in his shoulder. At one point, Dr.

² It appears from Employer's brief that Employer is arguing in the alternative that either Claimant's shoulder problem resulted from his earlier injury with Halter Marine in 2000 and did not arise from this incident or if the shoulder injury resulted from this incident, the surgery which Claimant desires is not necessary.

Garcia diagnosed Claimant with a shoulder sprain. Claimant's complaints of shoulder pain continued during his treatment with Dr. Gabel, who eventually sent Claimant for an MRI. The MRI revealed a small partial thickness intrasubstance tear of the supraspinatus tendon of Claimant's rotator cuff.

Based on a review of the evidence, Claimant has produced evidence to show that a work related accident, which could have caused his shoulder injury, occurred.

2. The Employer has rebutted the §20(a) presumption.

If the Claimant successfully raises the presumption, "the burden shifts to the Employer to rebut it through facts- not mere speculation that the harm was not work related." Conoco, 194 F.3d at 687-688. The evidence presented by the Employer must be "specific and comprehensive enough to sever the potential connection between the disability and the work environment." Champion v. S & M Traylor Bros., 690 F.2d 285, 295 (D.C. Cir. 1982), *quoting* Parsons Corp. of California v. Director, 619 F.2d 38 (9th Cir. 1980). Therefore, to rebut the presumption, the Employer's evidence must indicate that Claimant's injury was not causally related to the alleged work accident. Eller & Co. v. Golden, 620 F.2d 71, 73 (5th Cir. 1980). Further, merely suggesting alternate ways Claimant may have been injured is not sufficient. Rather, the Employer must submit concrete evidence to rebut the presumption. Williams v. Chevron, U.S.A., Inc., 12 BRBS 95, 98 (1980). The unequivocal testimony of a doctor that there was no relationship between Claimant's injury and the conditions of his employment is sufficient to rebut the presumption. Kier v. Bethlehem Steel Corp., 16 BRBS 128, 129 (1984).

Employer contends that the condition of Claimant's shoulder is the same as it was after he was injured in 2000 while working for Halter Marine. Employer's Brief at 6. To support this argument, Employer has submitted medical records to show the extent of Claimant's 2000 shoulder injury. Among the medical records submitted by Employer is an MRI report dated April 28, 2000. EX 16 at 25. The MRI report states that Claimant had minimal rotator cuff and capsular strain with moderate contusion or strain of the subscapularis tendon. Id. Another MRI performed on September 12, 2000, reveals that Claimant's supraspinatus and infraspinatus tendons were intact. EX 16 at 46. The report also reflects that there was no significant evidence of a rotator cuff tear. EX 16 at 47. Employer also produced the report of Dr. Hussein Elkousy, who examined Claimant and could not determine the etiology of Claimant's shoulder pain. EX 10 at 3. Dr. Elkousy noted that Claimant had "rather dramatic symptoms" and stated that he could not causally relate Claimant's symptoms to his accident. Id. I find that this evidence is sufficient to rebut the presumption that the condition of Claimant's shoulder was causally related to a work related injury.

3. A review of all of the evidence establishes that Claimant's shoulder impairment is causally related to the work related injury from July 23, 2001.

If the Employer successfully rebuts the presumption, then the issue of causation must be decided by a review of all the evidence. Gooden v. Director, OWCP, 135 F.3d 1066, 1068 (5th Cir. 1998). Hislop v. Marine Terminals Corp., 14 B.R.B.S. 927, 931 (1982) (citing Del Vecchio

v. Bowers, 296 U.S. 280 (1935)). Claimant bears the burden of proving causation. See, generally, *Director, OWCP v. Greenwich Collieries*, 512 U.S. 267 (1994).

Employer contends that Claimant's shoulder injury was not causally related to his work accident of July 23, 2001. However, the evidence substantially establishes otherwise. Claimant testified that although he had residual pain from a prior shoulder injury, his shoulder did not bother him as much as it did after the July 23, 2001 incident. TR at 54-55. Further, objective tests conducted after the July 23, 2001 incident reveal a tear in Claimant's rotator cuff (EX 9 at 36; CX 13 at 38), which was not seen in the images taken following the earlier injury. Dr. Fulford, who was appointed by the Department of Labor to conduct an independent medical examination, was the only doctor to provide testimony in this matter and stated his opinion that Claimant's shoulder problems were connected to the July 23, 2001 work accident. CX 21 at 18.

4. Claimant is entitled to temporary partial disability benefits from July 18, 2002 through August 26, 2002.

Claimant is seeking temporary total disability benefits from July 18, 2002 up to the present. It is undisputed that Claimant suffered a work related injury on July 23, 2001, and was paid temporary total disability payments from September 17, 2001 through July 17, 2002. EX 4; CX 10. Disability is defined in the LHWCA as "incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment. . . ." 33 U.S.C. § 902 (10). Disability under the LHWCA is an economic as well as medical concept. *Ledet v. Phillips Petroleum Co.*, 163 F.3d 901, 904 (1998). Therefore, a claimant must have an economic loss as well as an impairment that affects his ability to work in order to require compensation. *Spruill v. Stevedoring Serv. of America*, 25 BRBS 100, 110 (1991). An award of compensation is made according to the nature and extent of Claimant's disability. *Ledet*, 163 F.3d at 904. Permanent disability results if Claimant has any residual disability following the date of maximum medical improvement. *Id.* at 904-905. Any disability before Claimant reaches maximum medical improvement is temporary in nature. *Id.* at 905. The extent of disability is characterized as either partial or total. *Id.* To establish a case for total disability, Claimant must show he is unable to return to his former employment. *Id.* If Claimant makes a showing that he is unable to return to his former employment, Employer then has the burden to show suitable alternative employment exists. *Id.*

Following the surgical repair of Claimant's bicep tear, Dr. Gabel reported on August 26, 2002, that Claimant had reached maximum medical improvement and stated, "I think he will do fine at work." EX 9 at 22; CX 13 at 24. At that time, Dr. Gabel ascribed a 3% upper extremity permanent impairment to Claimant. EX 9 at 24. Claimant was released to return to work with no restrictions. EX 9 at 23.

Following the formal hearing in this matter, the parties reached a stipulation whereby Employer and Carrier paid Claimant benefits totaling \$18,197.42. This figure included benefits up to July 17, 2002, along with payment for the permanent partial disability rating assigned by Dr. Gabel. As a result, Claimant stipulated that he was not making a claim for any benefits during these periods.

The record establishes that Claimant's date of MMI was August 26, 2002. Following his examination of Claimant, Dr. Elkousy noted in his report that Dr. Gabel determined Claimant reached MMI on this date. Dr. Elkousy also stated in his report that MMI should be found and that the date previously given by Dr. Gabel could be used. When Dr. Gabel began treating Claimant, he expressed the opinion that Claimant's shoulder "would be fine." EX 9 at 3; CX. 13 at 5. Following bicep surgery, Claimant continued to complain of pain in his arm. Dr. Gabel reported that his pain could have been referred pain from his shoulder. EX 9 at 31. At that time, Claimant was given a subacromial injection, which Dr. Gabel later reported completely alleviated the discomfort Claimant was experiencing. EX 24 at 42. Dr. Gabel stated in his report that he would have an MRI conducted to "see if there is a significant issue there." Id. The MRI revealed that Claimant had a partial thickness intrasubstance rotator cuff tear. EX 9 at 36. On May 21, 2003, Dr. Gabel reported his opinion that surgery for Claimant's shoulder would be appropriate. EX 9 at 38. Dr. Gabel subsequently changed his opinion regarding Claimant's need for surgery after viewing the surveillance video provided by Employer. In a report dated October 8, 2003, Dr. Gabel stated the surveillance video was made while Claimant was receiving treatment for his shoulder. EX 9 at 42. Dr. Gabel noted that the activities performed by Claimant on the video were not consistent with Claimant's history. Id. As a result, Dr. Gabel recommended "deferring on any surgical issue and giving him a full release." Id.

On June 10, 2003, Claimant was examined by Dr. Elkousy. EX 10. Dr. Elkousy did not agree with Dr. Gabel's recommendation for surgery and stated that Claimant's MRI results did not explain the dramatic symptoms Claimant exhibited. EX 10 at 3. During his examination, Claimant stated that he could not move his arm away from his side. EX 10 at 2. However, Dr. Elkousy reported that he could elevate Claimant's arm to 170 degrees and leave it in that position. Id. Additionally, Dr. Elkousy reported that he could abduct Claimant's arm to 100 degrees and leave it in that position. Id. In his report, Dr. Elkousy stated "I would proceed with an MMI or use the one he previously had." Id.

Claimant was examined by Dr. Fulford on August 20, 2003. CX 2. Dr. Fulford testified that when he examined Claimant, "it was very difficult to examine the shoulder at all because of severe pain and movement." CX 21 at 25. Further, Claimant told Dr. Fulford that he had to keep his right arm tucked into his body in order to use it. CX 21 at 24. Following his examination of Claimant, Dr. Fulford reported that Claimant required shoulder surgery, which would allow Claimant to return to full unrestricted duties. CX 2 at 3; CX 21 at 15. Dr. Fulford testified that his opinion recommending surgery was based largely on Claimant's complaints of severe pain. CX 21 at 25. As a result of Dr. Fulford's recommendation, the Department of Labor instructed The American Longshore Mutual Association, the carrier in this matter, to authorize the surgery. CX 8. Dr. Fulford testified that he subsequently reviewed the surveillance tape. Dr. Fulford stated that Claimant's actions in the video were totally inconsistent with the complaints Claimant made to him. CX 21 at 24. As a result of the video, Dr. Fulford stated he began to doubt the reactions he observed during his examination of Claimant. EX 21 at 26.

I have reviewed the surveillance video and note that the actions of Claimant in the video are not consistent with the limitations he has reported to his various doctors and which he testified about. In the surveillance video, which was taken on March 13, 2003 and March 14, 2003, Claimant can be seen moving his right arm around freely. The video filmed on March 13,

2003, shows Claimant pushing and pulling a lawn mower at one point using only his right arm. Claimant is also seen bending over and using his right arm to gather weeds that are on the ground. Additionally, Claimant is seen using his right arm to open and close the hood and trunk of a car as well as extending his right arm to reach under the hood of the car. In the portion of the video filmed on March 14, 2003, Claimant is at a car wash holding his right arm over his head to wash the top of his car.

At the formal hearing, Claimant testified that he was receiving cortisone shots during the time period when the surveillance video was made and that these shots allowed him to perform chores such as mowing the lawn. TR at 43. A review of Dr. Gabel's medical records confirms that Claimant received an injection on February 17, 2003. EX 10 at 31. However, in a report dated April 1, 2003, Dr. Gabel reported that the injection Claimant received alleviated his discomfort for two weeks. EX 10 at 34. The surveillance video was made more than two weeks after Claimant received this injection. Therefore, the beneficial effect of the injection would have worn off by the time the video was made. Dr. Fulford testified that if the injection provided Claimant with relief for just two weeks, the activity shown in the video would have been inconsistent with his complaints. CX 21 at 32. Further, Claimant testified that the pain would be worse when it returned after a cortisone shot. TR at 45.

Claimant also testified that his arm was throbbing and that he had to take pain medication after mowing the lawn. TR at 47. However, during the course of the video, Claimant does not show any indication that he is experiencing pain or discomfort in his arm. Claimant is seen freely swinging his arm and moving it in different directions away from his body in order to complete the various activities depicted on the film.

I find that the totality of the evidence demonstrates that Claimant is not permanently disabled under the Act. I find that the evidence demonstrates that Claimant does not require further medical treatment for his shoulder and that the date of MMI given after his bicep surgery applies. However, since Employer and Carrier stopped paying Claimant benefits on July 17, 2002, I find that Employer and Carrier must pay Claimant temporary total benefits for the period from July 18, 2002 until August 26, 2002.

5. Claimant is not entitled to compensation for additional medical treatment.

Under the LHWCA, an employer "shall furnish such medical, surgical, and other attendance or treatment . . . for such period as the nature of the injury or the process of recovery may require." 33 U.S.C. §907 (a). Claimant asserts that he needs to undergo surgery on his right shoulder and seeks compensation for such surgery and for anticipated physical therapy during his period of recovery from surgery.

Based on my review of the evidence in this matter, I conclude that Claimant does not require surgery on his shoulder. I find Claimant's complaints of shoulder pain to be unreliable due to his activities on the surveillance video and the inconsistent findings during his medical examinations. Dr. Gabel, Claimant's treating physician and the doctor who first recommended surgery, concluded not only that surgery was not needed, but also that Claimant could be fully released. At the time of his examination, Dr. Elkousy stated that surgery was not necessary.

Although Dr. Fulford did not explicitly state that Claimant does not require surgery, he referred to Dr. Gabel's October 8, 2003 report as "an important letter." CX.21 at 27. Further, Dr. Fulford's testimony that Claimant's complaints were questionable indicates that he too wavered in his determination that Claimant required surgery to reach maximum medical improvement.

Since I have found that surgery on Claimant's shoulder is not necessary, Claimant is not entitled to receive compensation for further medical treatment related to his shoulder.

VI. CONCLUSION

Based upon the foregoing, I find that Claimant has established that he was disabled during the period from July 23, 2001 through August 26, 2002. Although Claimant sustained a work related injury to his shoulder, Claimant reached MMI as of August 26, 2002 and is not entitled to future medical benefits, including undergoing surgery on his shoulder. I find that the evidence establishes that Claimant's subjective complaints of pain in his shoulder were greatly exaggerated and that the evidence has shown that Claimant is capable of returning to work.

Since Employer and Carrier terminated Claimant's benefits on July 17, 2002 and I have found that Claimant did not reach MMI until August 26, 2002, Employer and Carrier must pay Claimant temporary total disability payments from July 18, 2002 through August 26, 2002.

ORDER

Based on the foregoing Findings of Fact and Conclusions of Law, and upon consideration of the record, it is hereby Ordered that:

1. Claimant's claim for addition medical benefits is DENIED.
2. Employer and Carrier must pay Claimant temporary total disability benefits for the period of July 18, 2002 through August 26, 2002, which shall be calculated by the Director, Office of Workers' Compensation Programs.
3. Claimant's counsel may file and serve a fee and cost petition in compliance with 20 C.F.R. § 702.132. He shall first attempt to reach an agreement with opposing counsel regarding fees and costs, and set forth the extent of those discussions in his petition.

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Janice K. Bullard
Administrative Law Judge

Cherry Hill, New Jersey